

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

Russell J. Simon, Jr.,

Civil No. 11-137 (DWF/JJG)

Petitioner,

v.

**ORDER ADOPTING REPORT  
AND RECOMMENDATION**

Bruce Reiser, Warden,

Respondent.

This matter is before the Court upon Petitioner Richard J. Simon, Jr.'s ("Petitioner") objections (Doc. No. 37) to Magistrate Judge Jeanne J. Graham's April 10, 2012 Report and Recommendation (Doc. No. 32) insofar as it recommends that Petitioner's Petition for Writ of Habeas Corpus be denied. Petitioner has also filed a motion for a certificate of appealability. (Doc. No. 38.) Respondent filed a response to Petitioner's objections on July 3, 2012. (Doc. No. 43.)

The Court has conducted a *de novo* review of the record, including a review of the arguments and submissions of the parties, pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.2(b). The factual background for the above-entitled matter is clearly and precisely set forth in the Report and Recommendation and is incorporated by reference for purposes of Petitioner's objections.

Having carefully reviewed the record, the Court concludes that Petitioner's objections offer no basis for departure from the Report and Recommendation. Petitioner contends that his state court criminal conviction was obtained in violation of his Fourth,

Fifth, Sixth, and Fourteenth Amendment rights. (Doc. No. 37.) In particular, Petitioner challenges the admissibility of his urinalysis results at trial and argues that he was deprived of assistance of counsel at his first appearance. Such allegations, however, do not overcome the Magistrate's finding that Petitioner has failed to establish a violation of his constitutional rights on any of the grounds articulated. *See, e.g., United States v. Lewis*, 483 F.3d 871, 873-74 (8th Cir. 2007). The Court concludes, as did Magistrate Judge Graham, that Petitioner's claims fail on the merits. Petitioner's petition for habeas relief is thus rightfully dismissed, and his requests for an evidentiary hearing and a certificate of appealability are properly denied. *See* 28 U.S.C. § 2254(e); 28 U.S.C. § 2253(c)(2) (noting that a court cannot grant a certificate of appealability unless the applicant has made "a substantial showing of the denial of a constitutional right").

Based upon the *de novo* review of the record and all of the arguments and submissions of the parties, and the Court being otherwise duly advised in the premises, the Court hereby enters the following:

### **ORDER**

1. Petitioner Russell J. Simon, Jr.'s objections (Doc. No. [37]) to Magistrate Judge Jeanne J. Graham's April 10, 2012 Report and Recommendation are

**OVERRULED.**

2. Magistrate Judge Jeanne J. Graham's April 10, 2012 Report and Recommendation (Doc. No. [32]) is **ADOPTED**.

3. Petitioner's Motion to Accept Reply Brief (Doc. No. [20]) is **GRANTED**.

4. Petitioner's Motion for an Evidentiary Hearing (Doc. No. [24]) is **DENIED**.
5. Petitioner's Motion to Respond to Respondent's Order From this Court (Doc. No. [25]) is **DENIED**.
6. Petitioner's Motion to Appoint Counsel (Doc. No. [26]) is **DENIED**.
7. Petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. No. [1]) is **DENIED**.
8. Petitioner's Motion for Certificate of Appealability in District Court (Doc. No. [38]) is **DENIED**. No Certificate of Appealability will be issued to Petitioner Russell J. Simon, Jr.
9. Petitioner's Motion for the State's Default on Petitioner's R&R Objections (Doc. No. [42]) is **DENIED AS MOOT**.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: July 12, 2012

s/Donovan W. Frank  
DONOVAN W. FRANK  
United States District Judge